NO. 48308-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK AND PATRICIA MAYKO,

Respondents,

v.

PACIFIC COUNTY,

Appellant.

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Appeal from Superior Court of Pacific County
Honorable F. Mark McCauley
NO. 14-2-00350-3

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# BRIEF OF RESPONDENTS

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## I. INTRODUCTION

Appellant Pacific County appeals from the October 27, 2015, Order on Appeal signed by the Pacific County Superior Court. (CP 156.) The Order was entered pursuant to a Land Use Petition Act ("LUPA") appeal filed by Mark and Patricia Mayko, Appellees in this action (hereinafter "Respondents" or "Maykos", which reversed the November 18, 2014 "Findings of Fact/Conclusions of Law and Decision Pertaining to Appeal of Administrative Decision No. PL140013LB" from the Pacific County Commissioners (CP 7-12) and the July 12, 2014 Administrative Decision of Pacific County Hearings Examiner Michael Turner. (CP 174-183.) The two decisions will be referred to collectively as the "County Decisions." The Superior Court found that both County Decisions were not supported by substantial evidence in light of the entire record, and that the conclusion that the Respondents had not met all the criteria to qualify for a variance was an erroneous interpretation of law and an erroneous application of the law to the facts. (CP 160-166.)

Literal interpretation of Pacific County's Critical Areas and Resource Land ("CARL") Ordinance No. 147 would not allow the Maykos to build a home, even though it would have no impact on the nearby wetlands. Given the unique circumstances not created by the Maykos, they are entitled to a variance that will do no more than allow them to build as their neighbors have.

Pacific County Superior Court correctly found that the Pacific County Administrative Findings were not supported by substantial

evidence, was an erroneous interpretation of law, and that the Respondents have met all the criteria to qualify for a variance. The Respondents also assert that the County did not properly follow its prescribed procedures and that the County Decisions violated the Respondents' constitutional rights. The Court's ruling should be affirmed, and the Respondents should be awarded attorney's fees under RCW 4.84.370 and 4.84.185.

Literal interpretation of Pacific County's Critical Areas and Resource Land ("CARL") Ordinance No. 147 would not allow the Maykos to build a home, even though it would have no impact on the nearby wetlands. Given the unique circumstances not created by the Maykos, they are entitled to a variance that will do no more than allow them to build as their neighbors have.

## II. STATEMENT OF THE CASE

### A. Procedural History.

Respondents sought a variance under Pacific County CARL Ordinance No. 147 and 147A in order to be able to develop on real property they owned in Pacific County. (CP 254-255.) On July 3, 2014, a hearing was held before Michael Turner, Administrative Hearings Examiner. Mr. Turner entered Findings denying the application on July 12, 2014. (CP 174-183.) The Respondents appealed to the Pacific County Commissioners as per local ordinance. (CP 171.) A hearing was held on September 23, 2014, and on November 18, 2014, the Commissioners entered Findings denying the variance. (CP 7-12.) On December 11, 2014, the Respondents filed a Land Use Petition in Pacific County Superior Court appealing the County

decisions. (CP 1.) On October 27, 2015, Pacific County Superior Court entered an Order reversing the Administrative Decision and the Commissioner's Decision and directing Pacific County to grant a variance to the Respondents. (CP 156.) Findings of Fact/Conclusions of Law and a Judgment awarding costs were also entered on October 27, 2015. (CP 160.) Pacific County appealed to Division II.

**B. Evidence.**

Respondents Mark and Patricia Mayko purchased the real property that is the subject of this appeal in 1993 for $60,000, and have timely paid all Pacific County property taxes, with a county assessed valuation of $185,000 in recent years. (CP 57-59.) On April 13, 1999, Pacific County passed its Critical Areas Ordinance (CARL). This ordinance set up wetland buffers for restricting building adjacent to wetlands.

The Respondents' property is located adjacent to Willapa Bay off Sandridge Road, near Long Beach, Washington. The Respondents wish to develop a home site and an on-site septic system ("OSS"). Over the years, the Maykos have paid for two septic approvals by Rob Payne and have spent thousands of dollars on weed control. (CP 58.) The proposed building site is 75 feet wide and is entirely within the 75 foot wetlands buffers for Category II Wetlands. (CP 186.) The Respondents seek to build a single family residence and septic system on their parcel. The entire parcel lies within wetland buffers that prohibit building without a variance. (CP 40.) The property is zoned "Conservancy Environment", by Pacific County. (CP 42.) One of the accepted uses in this zone is single-family residence. (CP

43.) Mr. Bogar also testified that the Maykos would be willing to use an "abbreviated drainage plan" which is often used to protect wetlands. (CP 45.)

In order to obtain a development permit from the County, the Respondents are required to seek a variance under Pacific County Critical Area Ordinance 147 and 147A (CARL). The first step in this procedure is a hearing before the Administrative Hearings Examiner, Michael Turner.

1. **Administrative Hearing**

The application was reviewed by Matt Reider from the Pacific County Planning Department, who provided a Staff Report that was part of the record in the administrative hearing. (CP 184-191.) Mr. Reider's report determined that the site contains Category III Wetlands, which require a 50-foot buffer from wetland boundary to upland development. (CP 186.) It was later determined by the Department of Ecology that the wetlands were actually Category II, requiring a 75-foot buffer. (CP 34.) Mr. Reider analyzed the application under Section 3(J) of Ordinance 147, which states which findings that must be met prior to granting a variance. The standards under Ordinance 147 are noted in italics.

His findings are summarized as follows:

*a. Special conditions and circumstances exist which are peculiar to the land.*

There is very little upland area available for development, the majority of which lies within 50 feet from delineated wetland inside the wetland buffer.

*b. Literal interpretation of the provisions of this Ordinance would deprive the person seeking the variance of rights commonly enjoyed by other properties conforming to the terms of the ordinance.*

The literal interpretation of the Ordinance without a variance would prevent all construction. Surrounding properties have single family residences on them even though surrounding properties have wetland communities on site.

*c. Special conditions and circumstances exist which do not result from the actions of the person seeking the variance.*

The Respondents have not changed or influenced the property since they purchased it.

*d. The granting of the variance requested will not confer on the person seeking the variance any special privilege that is denied by the Ordinance to other lands structures, or buildings under similar circumstances.*

Each variance request is heard and decided on its own merits. The granting of this variance will provide the property owner the option to construct a single family residence on his property. An existing gravel road already runs along the southern property boundary, providing access to the bay.

*e. The variance requested is the minimum necessary to afford relief.*

Given the physical characteristics of the property it appears that the variance is the minimum necessary to afford relief.

*f. To afford relief, the requested variance will not create significant impacts to critical areas and resource lands and will not be materially detrimental to the public welfare or contrary to the public interest.*

The applicant is requesting this variance to build a single family residence and onsite septic system. The entire upland boundary will be mitigated for by purchasing off-site, in-kind mitigation credits from Long Beach Mitigation Bank. Conditions can be placed, if approval is granted, to allow protection of the property's wetland community. (CP 188-189.)

Mr. Reider's Report notes that there would be no impact to the wetlands, only the buffer, and he also testified to this at the hearing before the Commissioners. (CP 92, CP 190.)

The Respondents were represented by Robert Bogar, a Washington-licensed Hydrogeologist, at the initial hearing and at the appeal to the Pacific County Commissioners. The application included a septic evaluation and wetland delineation as evidence in support of their request. their petition for a variance. (CP 195-256.) In order to address the wetland issues, the Respondents sought to mitigate wetlands impact through purchasing credits from the Long Beach Mitigation Bank. (CP 206-248.) This information was also submitted to the hearings examiner. At the first hearing, the Respondents provided testimony that the building site was at least 100 feet west of the ordinary high water mark on Willapa Bay. (CP 106.)

The petition for the variance was opposed by Dick Sheldon, who purported to be speaking on behalf of the Willapa Bay Oyster Growers . Mr. Sheldon referenced a permit application from 1983 on a different parcel as a basis to deny the Maykos' application. (CP 109-110.) Mr. Sheldon claimed that photos would prove that the wetlands were not Category III,

and that the unique characteristics of the shoreline adjacent to the Respondents' property made it impossible to determine the high water mark. (CP 110-111.) At no point in Mr. Sheldon's testimony did he provide any scientific evidence to support his claims. Mr. Sheldon emphasized that his goal was to protect the bay. Mr. Sheldon also stated, without any basis, that the Respondents were seeking this permit for the purpose of land speculation, without ascertaining any basis of knowledge. (CP 117.) The hearings examiner asked Mr. Sheldon if he was aware of any variances granted to properties in the vicinity of the Respondents' property, and also inquired as to whether Mr. Sheldon was aware of anything about the parcel that made it unique in its configuration. (CP 120.) The hearings examiner made the 1983 permit application and appeal part of the record. (CP 121.)

Ann Le Fors, a local landowner, analyzed the six-part test to be considered by the hearings examiner. (CP 124.) Ms. Le Fors testified that the Respondents' parcel was unique in that it had a joint easement adjacent to the property for access, and that this was unique within the Espy development. (CP 125.) Ms. Le Fors also asserted that the Espy lots are legal nonconforming lots, and could not be divided today the way they were at the time of platting. (CP 128.) However, she testified that she did not believe the Respondents met the other factors. (CP 125-126.)

On July 12, 2014, Mr. Turner issued his Administrative Decision on the Respondents' application, which included Findings of Fact and Conclusions of Law. (CP 174-183.) The Findings adopted Dick Sheldon's testimony that "he has been active in monitoring property development in

the area of the subject property for many years and was not aware of any variances similar to that being requested which had been granted in the general vicinity of the subject property." (CP 176-177.) The Findings also adopted Mr. Sheldon's testimony as to the type and location of wetlands, and his testimony that the site does not meet elevation requirements and that the variance will adversely affect the local salt marsh. (CP 177.) The Findings adopted Ann Le Fors' testimony that "no special circumstances related to the subject property in that all 18 properties in the Espy plat are similar." (CP 177.) The Findings also adopted Ms. Le Fors' conclusion that allowing the variance would result in a permanent impact to the wetland buffers. (CP 177.) The Findings do not address the findings in Matt Reider's Staff Report or the information provided by Robert Bogar, despite the fact that both of these individuals are specifically trained in environmental rules and land use issues.

The Decision goes on, in its Conclusions of Law, to state that the Respondents did not provide any evidence of special circumstances that are peculiar to the property, that they provide no evidence that the CARL Ordinance deprives them of rights commonly enjoyed by other parcels conforming to the terms of the CARL Ordinance, and also finds that granting the variance would confer on the Respondents a special privilege that is denied by the CARL Ordinance to other lands in similar circumstances. (CP 181-182.) The Decision ultimately found that the Respondents did not meet the criteria required for a CARL variance, and

denied their application. (CP 182-183.) The Maykos appealed the Decision to the Pacific County Commissioners. (CP 171.)

### 2. **Appeal to County Commissioners**

On October 14, 2014, the Pacific County Commissioners held a *de novo* appeal hearing.

Planner Matt Reider testified that he does not believe that the proposed development will have a significant impact on the wetlands or other critical areas. (CP 24.) He also testified that he believed that the proposed development is consistent with the regulations of the Shoreline Master Program. (CP 21.) Mr. Reider testified that the wetland mitigation proposed by the Maykos was acceptable to Pacific County. (CP 25.)

Robert Bogar testified as to the special circumstances of the Respondents' property. First, he noted that the Espy plats are generally similar, except for three parcels that were broken into sub-plats, including the Respondents' parcel. (CP 39.) This is three out of the 25 parcels within a half mile that have been short platted. The Mayko property is also distinct from the other short platted properties in that there is a driveway that provides access to the site. He testified that if they didn't have that driveway, they would have to directly impact the wetlands to put in a road. (CP 39.) Mr. Bogar testified that all of the land in the buildable area is at least 12 feet in elevation. (CP 37.)

Mr. Bogar submitted evidence of a septic evaluation done by Rod Payne that had been previously approved by the County. (CP 32, CP 16-202.) He also discussed a wetland mitigation report that he had prepared.

(CP 34.) Additionally, Mr. Bogar submitted an example of a variance that was granted to another property located on the Long Beach peninsula. This property was similar in that it is next to a Category I Willapa Bay wetland, it only impacted buffers (as opposed to actual wetlands), and wetland credits were purchased from the Mitigation Bank. (CP 38-39.) Mr. Bogar testified that he did not think that granting this variance would set a precedent, because, due to its size, location, elevation, and driveway access it is a completely unique parcel. (CP 35-37.) Mr. Bogar also noted that the site does not have a direct opening to the bay, and therefore all surface water runoff from the site will be infiltrated into the sandy soils beneath the site, which would further protect the wetlands. (CP 32.)

Dick Sheldon, as a lay citizen, provided unsupported testimony that the property development would be harmful to the wetlands. (CP 52.) Without providing supporting documentation, he testified that the wetlands mitigation would not be available for the Maykos' property because it abuts Willapa Bay. He also testified that he believed that it was the County's policy to not reward land speculation. (CP 54.) He stated, without any cite to the record, that the Maykos had earlier testified that they had no plans to build on the property, and now they suddenly had plans to build. (CP 54.) Mr. Sheldon also made the wholly unsupported statement that the property was "never buildable". (CP 54.) He testified that the Maykos had bought a piece of "junk property", and were trying to "slip it through" the County and get a variance that makes the property more valuable. (CP 54.) Mr. Sheldon testified that Mr. Mayko was either "lying before, or he was lying

now". (CP 55.) Again, Mr. Sheldon did not provide any scientific evidence to support his conclusions. Commissioner Ayers then followed up by asking the Maykos whether they planned on just selling the land after they received a variance. (CP 56.)

Tim Haderly testified on behalf of the Long Beach Mitigation Bank, that the Maykos were eligible to purchase wetland credits for their property. (CP 62.)

Ann Le Fors testified again and pointed out that no other property on the bay had a 30-foot easement next to it, and this gives the Maykos an ability to build a road that would require permits for parties not holding an easement. (CP 77.)

On November 18, 2014, the Pacific County Commissioners issued a document entitled "Findings of Fact/Conclusions of Law and Decision Pertaining to Appeal of Administrative Decision No. PL140013LB". (CP 7-11.) The Findings appear to parrot the Findings of the Administrative Hearing, despite the different evidence presented. This decision ultimately denied the Respondents' request for a CARL variance. The Respondents timely appealed the decision to Pacific County Superior Court under the Land Use Petition Act (LUPA). (CP 1.)

## III. LEGAL ARGUMENT

### A. Pacific County Superior Court properly found that the Administrative Decision and Board of County Commissioner's Decision are erroneous applications of the law to the facts, and are erroneous interpretations of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.

Under the Pacific County CARL Ordinance, a variance "shall be granted" in the event that the person requesting the variance can demonstrate that the requested variance conforms to all of the following, each of which has been demonstrated by the Maykos:

a. Special circumstances exist which are peculiar to the land, and;

b. Literal interpretation of the CARL Ordinance deprives the requester of rights commonly enjoyed by other properties conforming to the terms of the Ordinance, and;

c. The special conditions and circumstances do not result from the actions of the requester, and;

d. Granting the requested variance will confer no special privilege that is denied by the CARL Ordinance to other lands, structures or buildings under similar circumstances, and;

e. The variance requested is the minimum necessary to afford relief, and;

f. The requested variance will not create significant impacts to critical areas and resource lands and will not be materially detrimental to the public welfare or contrary to the public interest.

The Land Use Petition Act (LUPA) is intended to be the exclusive means for appealing local "land use decisions". A "land use decision" is defined as "a final determination by a local jurisdiction's body or office with the highest level of authority to make a determination, including those with authority to hear appeals." *See* RCW 36.70C.020.

RCW 36.70C.130 provides that a Court may grant relief if the moving party has sustained its burden of proof under one of the six standards for granting relief, as stated below:

A. The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

B. The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of law by a local jurisdiction with expertise;

C. The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

D. The land use decision is a clearly erroneous application of the law to the facts;

E. The land use decision is outside the authority or jurisdiction of the body or officer making the decision;

F. The land use decision violates the constitutional rights of the party seeking relief.

Standards A, B, E and F present questions of law and should be reviewed *de novo*. *City of Olympia v Drebick*, 156 Wn.2d 289 (2006).

Standard A is ordinarily applied when reviewing alleged procedural errors or irregularities. *Moss v. City of Bellingham*, 109 Wn. App. 6, (2001). Standard B calls for the court to grant deference to the local government's interpretation of the law where ambiguous. Standard C presents a factual determination, requiring the court to look at the record and determine whether the local jurisdiction's decision was adequately supported by substantial evidence. *United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 687-88 (2001). Standard D requires the court to consider whether the local jurisdiction properly applied the law to the facts and conclude whether the local jurisdiction's decision was clearly erroneous. This is a mixed issue of law and fact, and should also be reviewed *de novo*. *Leschi Improvement Council v. State Highway Commission*, 84 Wn. 2d 271, 284 (1974). A decision is "clearly erroneous only when the court is left with the definite and firm conviction that a mistake has been made." *Willapa Grays Harbor Oyster Growers Association v. Moby Dick Corp.*, 115 Wn. App. 417, 429 (2003).

Standard E directs the court to consider whether the local jurisdiction acted outside of its jurisdiction or authority in issuing the land use decision. *Biermann v. City of Spokane*, 90 Wn. App 816, 821-22 (1998).

Standard F requires the court to consider whether the local land use decision is a violation of a party's constitutional rights. *Peste v. Mason County*, 133 Wn. App 456 (2006).

RCW 36.70C.140 sets forth the range of actions that a court may take in deciding a LUPA appeal. It provides that "the court may affirm or

reverse the land use decision under review or remand it for modification or further proceedings." When the court remands the matter to the local jurisdiction for further proceedings, "the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction."

One approach was used by the Spokane City Council in reversing the decision of the County Hearings Examiner denying an application for rezone. In this case, the City Council reversed the decision and directed approval of the application based on the "concepts" set out in the City's Comprehensive Plan. *Pinecrest Homeowner's Ass'n v. Glen A. Cloninger & Assocs*,115 Wn. App. 611 (2003). In this case, that meant that although the City Zoning Ordinance did not have a specific "mixed use" designation, it must be categorized by similarity to listed uses and allowed in the appropriate zone or by special permit as the case may be.

Pacific County Ordinance 147 states that its purpose is "to define, identify and protect critical areas and resource lands as required by the Growth Management Act of 1990." 147(1)(B). This is now codified as RCW 36.70A. The Ordinance also has a "Statement of Purpose" which provides that:

> [i]t is a policy of Pacific County that the beneficial functions, and structure, and values of critical areas and resource lands be protected as identified in this Ordinance, and further that potential dangers or public costs associated with inappropriate use of such areas be minimized by reasonable regulation of uses within, adjacent to, or directly affecting such areas. Reasonable regulation shall be achieved by the balancing of individual and collective interests.

RCW 36.70C does not include any provisions regarding the recovery of attorney fees, but Washington courts have authorized recovery of attorney fees in LUPA appeals under RCW 4.84.370 and RCW 4.84.185. However, RCW 4.84.370 only allows an award of fees to a prevailing or substantially prevailing party on appeal before the court of appeals or supreme court.

The record from both hearings clearly shows that the Maykos demonstrated that their request for a variance comported with all six factors to be considered in Ordinance 147, and the County's findings were erroneous interpretations of the law. It is worth noting that the Commissioners' analysis as to the six factors is almost identical to that from the Administrative Decision, despite the wide divergence in testimony provided.

1. **Special circumstances exist which are peculiar to the land.**

    a) **The property is unique because it already has a driveway easement, is one of only three properties within a half -mile to be subplatted, and building will not impact the wetlands.**

In both hearings the Maykos demonstrated that their parcel was unique. At the initial hearing, Matt Reider's Report provides facts that demonstrate that the property is unique. The property has very little upland area available for development, and the land that was available was all within 50 feet of the delineated wetland. (CP 188.) However, it is unique

in that, despite these handicaps, building would have no impact on the wetlands. (CP 92, 190.)

The only contravening evidence the County points to is the testimony of two individuals who opposed the granting of the variance. These individuals did not provide any evidence that "being unable to develop because the property is in a wetland or wetland buffer was not unique to the Maykos but widespread on the Peninsula" other than simply stating that this was their belief. In fact, Ann Le Fors, one of the individuals, testified that the Respondents' parcel was unique in that it had a joint easement adjacent to the property for access, and that this was unique within the Espy development. (CP 125.) Ms. Le Fors also noted that the Espy lots are legal nonconforming lots, and could not be divided today the way they were at the time of platting. (CP 128.)

Further, at the hearing before the Commissioners, Mr. Bogar testified that among the Espy Plats, there are only three parcels out of 25 within a half mile that have been short platted. (CP 35.) Mr. Bogar also noted that the fact that the driveway is already installed allows them to avoid directly impacting the wetlands to put in a road. (CP 37.)

No one is arguing that being unable to develop because of wetland regulations is unique to the Maykos. However, the fact that there is no credible evidence that the development would have any impact on the wetlands, the peculiar topography of the parcel, and the fact that the Maykos' parcel is one of only three to be short platted in their plat, and is the only one with a driveway clearly shows that their property is unique.

Even granting deference to the Administrative Hearings Administrator and the Commissioners, the finding that "the applicants provided inadequate evidence that any special conditions and circumstances exist which is [sic] peculiar to the subject property" is a clearly an erroneous application of the law to the facts and is not supported by substantial evidence. (CP 10.) It is difficult to imagine a property owner with a parcel that has more special conditions and circumstances.

2. **Literal interpretation of the provisions of this Ordinance would deprive the person seeking the variance of rights commonly enjoyed by other properties conforming to the terms of the ordinance.**

a) **Properties near the Maykos have wetland communities on site, and have been allowed to develop.**

The Maykos provided ample evidence at both hearings that literal interpretation of the Ordinance without a variance would prevent all construction. As noted in Matt Reider's Report, surrounding properties have single family residences on them even though surrounding properties have wetland communities on site. (CP 188.) The Commissioners' Conclusions of Law states, in part, that "The applicants provided no evidence that literal interpretation of the provisions of this Ordinance would deprive them of rights commonly enjoyed by other properties conforming to the terms of the CARL Ordinance No. 147. They testified that they will not be able to develop the property as they wished and as they expected to, but failed to provide evidence of any rights that they are deprived of that is [sic] enjoyed by others who conform to the CARL Ordinance No. 147."

(CP 10.) However, the evidence did not just show that the Maykos could not build, it also demonstrated that other landowners in the area were able to build, despite having wetland communities on site. (CP 38-39, CP 188.) Unfortunately, the Maykos do not have as large of a parcel and as large of a buildable area as those properties. This is why they don't comply with the Ordinance, and, given the unrefuted testimony that there will be no damage to the wetlands, this is a perfect example of why the County has variances available. (CP 24, 27, 35, 92, 106.) The Commissioners' Decision is an erroneous reading of what the Ordinance is meant to address, and is an erroneous application of the law to the facts.

3. **Special conditions and circumstances exist which do not result from the actions of the person seeking the variance.**

It is undisputed in the record that the Respondents have not changed or influenced the property since they purchased it.

4. **The granting of the variance requested will not confer on the person seeking the variance any special privilege that is denied by the Ordinance to other lands structures, or buildings under similar circumstances.**

a) **The variance will not grant the Respondents any special benefits denied to similarly situated properties. There are very few "similar" properties.**

The Administrative Hearing Officer found that "granting the requested variance will confer on the applicants a special privilege that is denied by the CARL Ordinance to other lands, structures, or buildings under similar circumstances. All other lands under similar circumstances would

be denied the right to develop because of the impact on wetland buffers, thus the applicant would have a right to develop property that no other similar property would have." (CP 182.) The Commissioners' Decision disposes of the issue by stating that "the applicants did not adequately demonstrate all options were exercised to minimize the impacts", and does not appear to address the issue of "special privilege." (CP 10.)

Every property, is, of course, unique, and each variance request is heard and decided on its own merits. As has been noted throughout, all scientific evidence suggests that building a house on the parcel would have no impact on the wetlands. So, the question would seem to be, would granting a variance for a parcel that is in technical violation of Ordinance 147, but will have no impact on the wetlands, set a precedent that could be exploited by other landowners? Taking the Conclusions of Law in the Administrative Decision at their word, no one could ever get a variance under the CARL Ordinance because it is always possible that a person with a "similar" property would be denied the variance. The implication of the statements by Ms. Le Fors that were adopted by the Hearings Examiner is that if you allow any variances, suddenly you have to grant a variance to everyone. However, under Ordinance 147, the County is required to look at each parcel individually and make a decision based on its unique characteristics. As noted earlier, this property has many unique circumstances, and it is hard to imagine many "similar" properties.

At the hearing before the Commissioners, Mr. Bogar submitted an example of a variance to build a single family residence that was granted to

another property located on the Long Beach Peninsula. (CP 38-39.) The property was similar, although in fact more restrictive, in that it was located next to a Category I Willapa Bay wetland. With the prior variance, the evidence demonstrated building would only impact wetland buffers (as opposed to actual wetlands), and wetland credits were purchased from the Mitigation Bank. (CP 38-39.) Similarly, the granting of this variance will provide the Maykos with the option to construct a single family residence on their property. An existing gravel road already runs along the southern property boundary, providing access to the bay. (CP 77.) This property will not obtain any privilege not already given to a similarly situated landowner. The County's finding that the granting of the variance will grant a special privilege to the Maykos is an erroneous interpretation of the law, based on the facts presented.

5. **The variance requested is the minimum necessary to afford relief.**

**a) There is no economically viable use of the property short of the building of a single-family residence.**

There was ample evidence, including the Planner's Report, at both hearings to show that, given the physical characteristics of the property, the variance is the minimum necessary to afford relief.

According to the record, the property is 900 feet long, and approximately 131 feet wide. The building site is on the western most edge of the property. (CP 185.) The upland site extends 75 feet from the western property boundary, and extends for the entire width of the parcel, 131 feet.

(CP 186.) Matt Reider's Report found that the building of a single family residence as described by the Maykos was "the minimum necessary to provide relief." According to the Section 2.0 of the Wetland Mitigation Report, the delineation of the wetlands was limited to the western 150 feet because the center and east part of the property appears to be freshwater wetlands transitioning to saltwater wetlands. (CP 211.) This data clearly shows that the Maykos have a very limited building area to work with, and that what is offered is effectively the minimum they can do to make economic use of the property. The Maykos clearly demonstrated that the variance requested is the minimum necessary to afford relief, and the County findings that the Maykos have not done so is an erroneous interpretation of the law.

6. **To afford relief, the requested variance will not create significant impacts to critical areas and resource lands and will not be materially detrimental to the public welfare or contrary to the public interest.**

   a) **There is no scientific evidence that the granting of the variance will have any negative environmental impacts, and all of the scientific evidence suggests little to no impact.**

Both Matt Reider and Bob Bogar noted that the project would not have significant impacts on the wetlands or other critical areas. The Maykos provided evidence that entire upland boundary will be mitigated for by purchasing off-site, in-kind mitigation credits from Long Beach Mitigation Bank. As noted by Matt Reider, conditions can be placed, if approval is granted, to allow protection of the property's wetland community. (CP

189.) The Administrative Decision states that there is "evidence that to afford the relief requested the variance may create significant impacts to critical areas and resource lands." (CP 82.) The Commissioner's Decision states that "[t]he applicants did not provide adequate evidence that the relief requested by the variance would not create significant impacts to critical areas and resource lands." (CP 10.) It is clear from the record that there is no scientific evidence of any kind to support these findings. Both Mr. Reider and Mr. Bogar determined that there would not be significant impacts. The only facts in the record suggestive of "impacts" are Dick Sheldon's beliefs as to the elevation of the land and the possible impact of the home, and Ms. Le Fors belief that granting the variance will create some kind of "slippery slope", where granting this variance will allow every property to get a variance, regardless of circumstances.

The County's assertion that the Maykos needed to show that the project would not affect the wetland *buffer* begs the question: How would one show that they don't affect a buffer, as opposed to actual wetland communities? As a practical matter, the whole property is in a wetland buffer, so, by the County's reading, no one could ever get a variance within a wetland buffer.

Clearly, the County's holding that the Maykos have failed to demonstrate that the variance will not create a substantial impact to critical areas is an erroneous application of the law to the facts.

### B. Pacific County Superior Court properly found that the Administrative Decision and Board of County Commissioner's Decision are not supported by evidence that is substantial when viewed in light of the whole record before the court.

The record from both hearings clearly shows that the Maykos demonstrated that their request for a variance comported with all six factors to be considered in Ordinance 147. The Findings at the Administrative Hearing and the hearing before the Pacific County Commissioners are not supported by substantial evidence when viewed in light of the whole record before the Court. In fact, it is clear that substantial evidence supports the Superior Court's finding that the Maykos demonstrated that they met all six requirements to obtain a variance.

#### 1. Special circumstances exist which are peculiar to the land.

##### a) Substantial evidence show that the property is unique because it already has a driveway easement, is one of only three properties within a half -mile to be sub-platted, and building will not impact the wetlands.

In both hearings the Maykos demonstrated that there are special circumstances peculiar to their land. At the initial hearing, Matt Reider's report clearly showed that the property was unique in that there was very little upland area available for development, and the land that was available was all within 50 feet from the delineated wetland, but the proposed project would have no impact on the wetlands. (CP 188, 190.) Further, at the hearing before the Commissioners, Bob Bogar testified that among the Espy

Plats, there are only three parcels out of 25 within a half mile that have been short platted. (CP 35.)

The only contravening evidence the County points to is the testimony of two individuals who opposed the granting of the variance. These individuals did not provide any evidence that "being unable to develop because the property is in a wetland or wetland buffer was not unique to the Maykos but widespread on the Peninsula" other than simply stating that this was their belief. In fact, Ann Le Fors, one of the individuals, testified that the Respondents' parcel was unique in that it had a joint easement adjacent to the property for access, and that this was unique within the Espy development. (CP 125.) It is also unique in that it has a driveway that provides access to the site. (CR 65.) This is critical because, without a driveway, they would have to directly impact the wetlands to put in a road. (CP 77.) Ms. Le Fors also noted that the Espy lots are legal nonconforming lots, and could not be divided today the way they were at the time of platting. (CP 128.)

The finding that "the applicants provided inadequate evidence that any special conditions and circumstances exist which is [sic] peculiar to the subject property" is not supported by substantial evidence. (CP 10.) It is difficult to imagine a property owner providing a parcel that has more special conditions and circumstances.

2. **Literal interpretation of the provisions of this Ordinance would deprive the person seeking the variance of rights commonly enjoyed by other properties conforming to the terms of the ordinance.**

**a) Properties near the Maykos have wetland communities on site, and have been allowed to develop.**

The Maykos provided ample evidence at both hearings that literal interpretation of the Ordinance without a variance would prevent all construction. As noted in Matt Reider's Report, surrounding properties have single family residences on them even though surrounding properties have wetland communities on site. The Commissioners' Conclusion of Law states, in part, that "[t]he applicants provided no evidence that literal interpretation of the provisions of this Ordinance would deprive them of rights commonly enjoyed by other properties conforming to the terms of the CARL Ordinance No. 147. (CP 11.) They testified that they will not be able to develop the property as they wished and as they expected to, but failed to provide evidence of any rights that they are deprived of that is [sic] enjoyed by others who conform to the CARL Ordinance No. 147." (CP 11.)

However, the Maykos did not just show that they could not build, they showed that other landowners in the area were able to build, despite having wetland communities on site. Given the unrefuted testimony that there will be no damage to the wetlands, this is a perfect example of why the County has variances available. The only contrary evidence were unsupported statements by lay members of the public. The Decision of the

Administrative Judge and the Commissioners' Decision are not supported by substantial evidence.

3. **Special conditions and circumstances exist which do not result from the actions of the person seeking the variance.**

It is undisputed in the record that the Respondents have not changed or influenced the property since they purchased it.

4. **The granting of the variance requested will not confer on the person seeking the variance any special privilege that is denied by the Ordinance to other lands structures, or buildings under similar circumstances.**

**a) There is evidence that similarly situated properties have been granted variances by Pacific County. There are very few "similar" properties.**

As noted above, the Administrative Order determined that the variance would give the Maykos a "special privilege denied to other properties under the CARL Ordinance", and the Commissioners' Decision does not appear to address this issue. (CP 182.)

At the hearing before the Commissioners, Mr. Bogar submitted an example of a variance to build a single family residence that was granted to another property located on the Long Beach Peninsula. (CP 37-39.) The property was similar, although in fact more restrictive, in that it was located next to a Category I Willapa Bay wetland. With the prior variance, the evidence demonstrated building would only impact wetland buffers (as opposed to actual wetlands), and wetland credits were purchased from the Mitigation Bank. (CP 37-39.) Similarly, the granting of this variance will

provide the Maykos with the option to construct a single family residence on their property. An existing gravel road already runs along the southern property boundary, providing access to the bay. (CP 77.) This property will not obtain any privilege not already given to a similarly situated landowner. There is ample evidence in the record that the Maykos' property is uniquely situated, and it is unlikely that this will open the floodgates to all property owners within wetland buffers. The County's finding that the granting of the variance will grant a special privilege to the Maykos is not supported by substantial evidence, and the Maykos provided ample evidence to show that they will not receive a "special privilege" denied by to other landowners under the Ordinance.

5. **The variance requested is the minimum necessary to afford relief.**

a) **Substantial evidence demonstrates that the building of a single family residence is "the minimum necessary to provide relief."**

There is ample evidence in the record to show that, given the physical characteristics of the property, the variance is the minimum necessary to afford relief.

The property is 900 feet long, and approximately 131 feet wide. The building site is on the western-most edge of the property. (CP 185.) The upland site extends 75 feet from the western property boundary, and extends for the entire width of the parcel. (CP 186 .) Mr. Reider's Report found that the building of a single family residence is "the minimum necessary to provide relief." (CP 189.) The data clearly shows that the Maykos have a

very limited building area to work with, and that what is offered is effectively the minimum they can do to make economic use of the property. The Maykos clearly demonstrated that the variance requested is the minimum necessary to afford relief, and the County findings that the Maykos have not done so is not supported by substantial evidence in the record.

6. **To afford relief, the requested variance will not create significant impacts to critical areas and resource lands and will not be materially detrimental to the public welfare or contrary to the public interest.**

a) **There is no scientific evidence that the granting of the variance will have any negative environmental impacts, or that development will be detrimental to the public interest.**

Both County Decisions state that there is "evidence that to afford the relief requested the variance may create significant impacts to critical areas and resource lands." (CP 10, CP 182.) However, it is clear from the record that there is no scientific evidence of any kind to support this finding. The only facts in the record suggesting impacts are Dick Sheldon's beliefs as to the elevation of the land and the possible impact of the home, and Ms. Le Fors' belief that granting the variance will create some kind of "slippery slope", where granting this variance will allow every property to get a variance, regardless of circumstances.

As noted above, the only scientific testimony in the record states that there will be no impacts to critical areas and/or wetlands. The Maykos provided evidence that entire upland boundary will be mitigated for by

purchasing off-site, in-kind mitigation credits from Long Beach Mitigation Bank. As noted by Matt Reider, conditions can be placed, if approval is granted, to allow protection of the property's wetland community. Clearly, the County's holding that the Maykos have failed to demonstrate that the variance will not create a substantial impact to critical areas is not supported by substantial evidence.

### C. The Pacific County Hearings Examiner and the Pacific County Commissioners Engaged in Unlawful Procedure and Failed to Follow a Prescribed Process.

Both the Hearings Examiner and County Commissioners committed procedural error by allowing themselves to be persuaded by public opinion in opposition to the Maykos' application. There is ample evidence in the record to show that at both hearings the persons hearing the application were overly deferential to the unsubstantiated personal opinions of Dick Sheldon, representing the Willapa Bay Oyster Growers Association.

One example comes from the initial hearing. In that hearing, Dick Sheldon *sua sponte* opined that the Maykos were engaging in land speculation. (CP 117.) Apparently treating Mr. Sheldon as a sort of expert witness, the hearings examiner then asked Mr. Sheldon if he was aware of any variances granted to properties in the vicinity of the Maykos' property, and also inquired as to whether Mr. Sheldon was aware of anything about the parcel that made it unique in its configuration. (CP 120-121.) The Findings cite to Mr. Sheldon's unsupported conclusions, but do not cite to the scientific evidence provided by Mr. Reider and Mr. Bogar. (CP 174-183.)

Another example comes from the hearing before the Commissioners. In that hearing, Mr. Sheldon alleged that the Maykos had earlier testified that they had no plans to build on the property, and now they suddenly had plans to build. Mr. Sheldon testified that the property was "never buildable". (CP 54.) He testified that the Maykos had bought a piece of "junk property", and were trying to "slip it through" the County and get a variance that makes the property more valuable. (CP 54.) Mr. Sheldon testified that Mr. Mayko was either "lying before, or he was lying now". (CP 55.) Other than Mr. Sheldon's imagination, the basis for this allegation is entirely unclear. Commissioner Ayers, apparently giving weight to these unsupported slurs, followed up by asking the Maykos whether they planned on just selling the land after they received a variance. (CP 56.) The Maykos purchased the land in 1993, before the CARL Ordinance was even passed. (CP 57.) Whether the Maykos plan to build or sell the property is not relevant to determining whether they should be granted a variance, and it suggests that the Commissioners were overly influenced by Mr. Sheldon's negative testimony.

### D. The Administrative Decisions Violate the Constitutional Rights of the Respondents.

The Respondents' property is a small lot directly abutting Willapa Bay, with wetlands on-site. When Respondents purchased the property in 1993 it was lawful to construct a single family residence on the property without the need of a variance. On April 13, 1999, Pacific County passed

its Critical Areas and Resource Lands Ordinance (CARL), which included new regulations on wetland buffers.

The Makyos invested considerable sums in the property, including purchase price, property taxes, septic design and property maintenance, and reasonably expected that their investment would allow them to construct a home on the property. The denial of the variance has deprived Respondents of any economically viable use of their property. Where beachfront lots are subjected to a construction ban, the lots are economically idle and the owners are forced to sacrifice all economically viable use of the land. Regulations requiring land to be left in a natural state result in a total taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The denial of the Maykos' request for a variance is an unconstitutional taking without compensation.

### E. Request for Attorney Fees and Costs on Appeal

RCW 36.70C does not include provisions for recovery of attorney fees on appeal, but Washington courts have awarded attorney fees on LUPA appeals under RCW 4.84.370 and 4.84.185. RAP 14.2 also allows the award of costs to the substantially prevailing party.

In the case of *Zink v City of Mesa*, 137 Wn App 271 (2007), Division III held that attorneys' fees could be awarded under RCW 4.84.185 in a LUPA case for frivolous and unreasonable claims or defenses. *Id.* At 276. The court held that LUPA petitions are civil actions, and under the plain language RCW 4.84.185, attorney fees can be awarded upon written

findings that "the defense was frivolous and advanced without reasonable cause."

Pacific County Superior Court found that the County Decisions were not supported by substantial evidence and improperly applied the law to the facts. The facts have not changed for this appeal, and the County's appeal is frivolous and advanced without reasonable cause.

RCW 4.84.370 provides that attorney fees are only awarded if the "prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings." However, in *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2006), the petitioning private party argued that RCW 4.84.370 denies equal protection on two theories. First, the private party argued that the statute discriminated among private parties based on their alignment with the local government, rather than on the merits of their positions. *Id.* At 414-15. Second, the private party also argued that the statute discriminated between the local government and private parties, arguing that the government will never be the losing party because it will always prevail before itself at the administrative level. *Id.* At 416. The Court was ultimately unpersuaded by these arguments, but the Respondents believe they continue to have relevance in this case, and argue that an equal protection should allow them to be awarded attorney's fees if they prevail in this appeal.

## IV. CONCLUSION

It is evident from reviewing the record that both the Administrative Decision and Commissioner's Decision denying the variance are erroneous

interpretations of the law and clearly erroneous applications of the law to the facts, even after giving deference to the local jurisdiction's expertise. There is no evidence based on any kind of professional or scientific expertise to support the decisions. There is evidence in both hearings that the decision makers gave undeserved weight to the unsupported and biased testimony of opponents of the variance. This provides strong evidence that the County engaged in improper process and failed to properly file.

There is un-contradicted scientific evidence that building a single family dwelling and septic system on the land will have no impact on wetlands or other critical areas. It is also clear that building a single family home is the minimum economic use the Maykos can make of their property. There is evidence that other properties abutting the wetlands on Willapa Bay have been granted variances to build on their land, and it is clear that the Maykos' parcel is unique in its shape, location, and driveway access. Both decisions posit that the Maykos provided "no evidence" to support their Petition, in clear contradiction to the record. Those findings are clearly not supported by substantial evidence in light of the whole record before the Court. Finally, the denial of the variance removes all viable economic use of the Maykos' property, and clearly constitutes a taking under *Lucas*.

This Court should affirm the Order of the Pacific County Superior Court to grant a variance to the Maykos to build a single family residence with septic on their property, and should award attorney's fees and cost to the Respondents on appeal.

Respectfully submitted this 14th day of March, 2016.

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CERTIFICATE OF SERVICE

I, TAMRON CLEVENGER, hereby certify that on the date listed below, I caused the foregoing Brief of Respondent to be electronically filed with the Court of Appeals and a copy emailed and hand-delivered and addressed as follows:

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Dated March 14, 2016, South Bend, Washington.

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# WILLIAM PENOYAR ATTORNEY AT LAW

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